IN THE MATTER OF THE ARBITRATION BETWEEN:	)	
	)	
PORTLAND COMMUNITY COLLEGE	)	
FACULTY FEDERATION,	)	**ARBITRATOR'S**
Union,	)	
	)	**OPINION**
and	)	
	)	**AND**
PORTLAND COMMUNITY COLLEGE,	)	
Employer.	)	**AWARD**
	)	
	)	

Tuition Waiver Grievance

HEARING SITE: Portland Community College Cascade Campus
Portland, Oregon

HEARING DATE: August 6, 2002
RECORD CLOSED: September 23, 2002
DATE OF AWARD: October 14, 2002

ARBITRATOR: William F. Reeves
P.O. Box 1259
Ashland, OR 97520

APPEARING FOR THE UNION:
John Sutter
Labor Representative

APPEARING FOR THE EMPLOYER:
Craig Armstrong, Esq.
Miller, Nash, Wiener, Hager & Carlsen, LLP

WITNESSES
Jorge Bugarin B PCC Student, Spouse of Mara Silvera
Jan Chambers B PCC Instructor in Engineering Department
Phil Hess B PCC Student Aid Office Coordinator
Frank Goulard B PCC Faculty Federation Grievance Officer & Negotiation Team Member
Steve Carey B PCC Faculty Federation Negotiation Team Leader and Member
Mara Silvera B PCC Academic Advisor
Beverly Hooten B Former PCC Employee Relations Director
Jerry Donnlley B PCC Director, Human Resources
Michael Dembrow B President, PCC Faculty Federation

EXHIBITS

Joint Exhibits

J-1. Collective Bargaining Agreement (CBA) effective September 1, 2000 August 31, 2004.
J-2 Grievance, dated January 29, 2002.
J-3 PCC inter office memo dated March 5, 2002.
J-4 Grievance appeal, dated March 12, 2002.
J-5 Memo dated April 26, 2002.
J-6 Notice of Submission to Arbitration, dated May 10, 2002.
J-7 Article 26 Tuition Waiver, 1986-1989 Agreement.
J-8 Federation's Article 26 proposal, October 20, 1988.
J-9 Management's Article 26 proposal, November 18, 1988.
J-10 Federation Article 26 proposal, April 15, 1989
J-11 Management's Article 26 proposal, April 22, 1989
J-12 Article 26 tuition Waiver, 1989 - 92 Agreement

College Exhibits

C-1 Faculty, Administrator & Professional Support Staff tuition Waiver Authorization
C-2 College Negotiations Record, regarding Article 26
C-3 Board Report, dated April 20, 1989.
C-4 Faculty Agreement Summary dated June 15, 1989.
C-5 Classified Tuition Waiver Authorization
C-6 Article 18 Tuition Waivers, Classified Employee Agreement
C-7 Current Employee Tuition Waiver Authorization
C-8 Individuals who exceeded tuition waiver entitlement
C-9 College letter to Jorge Bugarin, dated October 19, 2001
C-10 Class record of Mr. Bugarin

Federation Exhibits

F-1 Academic transcript for Jorge Bugarin.
F-2 Academic Plan for Jorge Bugarin.
F-3 PCC engineering introductory flier.
F-4 PCC civil engineering advising guide.
F-5 PCC general education advising guide for engineering students.
F-6 2002-2003 Standards of satisfactory academic progress.
F-7 Time frame extension request for financial aid office.
F-8 Copy of email from Frank Goulard to Jerry Donnelly.
F-9 Negotiations Update January 10, 1989.
F-10 Management Proposals 1987 Negotiations.

PARTIES

Portland Community College Faculty Federation ("union" or "Federation") represents faculty and academic professionals of Portland Community College ("Employer," "PCC," or "College") in Portland, Oregon. Union and Employer negotiated a collective bargaining agreement ("CBA") effective September 1, 2000 through August 31, 2004 (Exhibit J-1), which the parties agree applies to the time frame of this grievance.

NATURE OF PROCEEDINGS

This arbitration was conducted pursuant to Article 25 the parties' CBA. At the hearing, witnesses were examined and cross-examined, exhibits introduced, and the parties presented oral opening statements. The record closed on September 23, 2002, upon my receipt of Employer's Posthearing Rebuttal Brief. Neither party raised procedural or substantive objection to the arbitrability of this case.

BACKGROUND AND FACTS

This arbitration involves a contract interpretation issue in which the facts are not in dispute. Mara Silvera is an academic professional in the bargaining unit. Silvera's spouse, Jorge Bugarin, is pursuing a degree at PCC. Article 15.12 of the Agreement states:

> Spouse, domestic partner and dependent children [of employees] shall be eligible for up to 19 credits per term each for a maximum of the credits required to obtain a two year degree in a College program.

In 1997, Bugarin began taking credits for which the College waived the tuition under CBA Article 15.12. As of the fall term of 2001, Bugarin had completed 98 credits at PCC. However, Bugarin still had 84 credits remaining at PCC before he can obtain an associate of science degree at PCC, and transfer to Portland State University as the equivalent of a junior in civil engineering. On October 19, 2001, College notified Bugarin he was approaching his tuition-waiver benefit limit.

The Federation filed a Step 2 grievance on January 29, 2002. The Federation contends Bugarin's efforts have been devoted solely to courses necessary for his degree, and he is entitled to tuition-waiver benefits under CBA Article 15.12.

On March 5, 2002, the Director of Human Resources denied the grievance because CBA Article 15.12 limits the "lifetime" benefits of an employee's family member to 114 credits.[1] The College believes this objective standard was what the parties intended when they negotiated CBA Article 15.12.[2] On March 12, 2002, the Federation appealed the Step 2 denial to

[1]The College's present formula for determining the lifetime tuition waiver benefit entitlement is nineteen (19) credit hours times six (6) terms (the time required to complete the core curriculum for a two-year degree) times the current dollar rate per credit hour. I have chosen to simply use 114 (19 credits times 6) as the College's interpretation of the lifetime maximum tuition-waiver benefit. (Also, the greatest number of credit hours required for a degree program at PCC is 114 credits). Additionally, I recognize the College's formula actually converts the credit hours to dollars. However, this is done in part to apply the tuition-waiver benefit to individuals taking non-credit CEU courses with tuition rates which exceed the total per-term value of an individuals's tuition waiver, and as a means of tracking the total use of the tuition-waiver benefit. I view the dollar equivalent as simply an administrative conversion of the tuition-waiver benefit.

[2]The College does not dispute Bugarin's course selections were "on track" for his Associate Degree in Engineering and his transfer to Portland State University. In fact, Bugarin has made an exceptionally stable and steadfast advance toward his degree while maintaining a 3.37 GPA. With the exception of nine credits, Bugarin's "additional" courses were prerequisite courses which he was required to take in order to enroll in the courses necessary for the degree program. For example,

the next administrative level, which was denied by the College on April 26, 2002. The Federation appealed the matter to binding arbitration on May 10, 2002.

ISSUE

The parties stipulated to the following issue statement:
Did the College violate Article 15.12 of the parties' collective bargaining agreement by not waiving tuition for an employee's spouse, Jorge Bugarin, beyond 19 credit hours times 6 terms times the current tuition rate per credit hour?

If so, what is the appropriate remedy?

PARTIES' ARGUMENTS

Union's Arguments

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before Burgarin could take the required "Calculus" he needed to take the prerequisite "Introductory Algebra." Additionally, English is Bugarin's second language. Bugarin took several ENNL courses, and several reading and writing courses. These were not required by any program, but were necessary for Bugarin to gain proficiency in speaking, reading, and writing the English language.

The Federation contends CBA Article 15.12 is unambiguous. According to the Federation, the plain language of CBA Article 15.12 requires the College to waive tuition for all credits Bugarin is required to take to complete his degree. The Federation argues that, with the possible exception of nine credits of recommended-but-not-necessary courses, Bugarin has only taken courses required for his degree.

The Federation also contends the College's interpretation of "credits required to complete a two year degree" excludes prerequisite classes. According to the Federation, the College's interpretation should be rejected because it is commonly understood that many, if not most, PCC students must complete prerequisite classes before commencing credit courses to meet the requirements of the two-year degree programs at PCC. Thus, according to the Federation, the negotiators agreeing on the contract language understood that many students would be required to take prerequisite classes in addition to the classes required for a particular degree program.

Additionally, the Federation contends the bargaining history and past practice prohibits the College from ceasing Bugarin's benefit before he obtains his degree. The Federation alleges the College did not begin enforcing a tuition-waver benefit limit for spouses and dependents until 1998. Further, the Federation contends the bargaining history of the identically worded benefit in the agreement covering PCC's classified staff supports a conclusion that a six-term limitation is inconsistent with CBA Article 15.12.

The Federation also contends the College's failure to notify the Federation of the implementation of the tuition-waiver tracking system amounted to a change in the College's practice relating to providing the tuition-waiver benefit. According to the Federation, the parties must agree to a change in this established past practice.

Further, the Federation contends its interpretation of Article 15.12 would not lead to unreasonable and unjust results because the parties have a history of resolving contract administration issues on a case-by-case basis. Finally, the Federation argues that, to the extent CBA Article 15.12 is ambiguous, the ambiguity should be resolved in the Federation's favor because the language was adopted from a Management proposal.

Employer's Arguments

The College contends CBA Article 15.12 is unambiguous. According to the College, the plain language of CBA Article 15.12 limits an employee's family member's tuition-waiver benefits to 114 credits. The College argues this limitation is found in the phrase: "For a maximum of the credits required to obtain a two year degree in a College program." Depending on the program, 90 to 114 credits are required to obtain a two-year degree. Also, the nineteen (19) credit hours per term times six (6) terms (the usual time required to complete the core curriculum for a two-year degree) equals 114 credits. Thus, according to the College, the plain language of CBA Article 15.12 limits the maximum number of credits is limited to 114.

In the event Article 15.12 is considered ambiguous, then the College contends the undisputed evidence of the parties' past practice and bargaining history shows the parties intended to limit the number of credits for which the College must waive an employee's family member's tuition to 114.

Finally, the College contends the Federation's interpretation of Article 15.12 would lead to unreasonable and unjust results because it would substantially undermine the concept of a maximum limitation on the number of credits.

OPINION

In any contract interpretation case, an arbitrator's prime directive is to ascertain the parties' intent. The first step in this analysis is to determine whether, after considering the whole document, the language of the disputed provision is clear or ambiguous. If the language is ambiguous, then it may be necessary to examine bargaining history, past practices, or other relevant circumstances of the parties' continuing relationship to understand the context of the disputed provision. Finally, even if the language of a disputed provision is clear, it may be necessary to examine the context of a provision if the apparent clear meaning yields an interpretation that is absurd or nonsensical. *See generally,* Elkouri and Elkouri, How Arbitration Works (4th ed., 1997) p. 470 *et seq*.; and *The Common Law of the Workplace* (BNA, 1998) p. 62 *et seq.*

In examining CBA Article 15.12, I find the CBA clearly provides tuition-waiver benefits for employees' dependents for a maximum of 19 credits per term. Further, I find Article 15.12 establishes a maximum "lifetime" tuition-waiver benefit. However, Article 15.12 fails to clearly state how this maximum "lifetime" benefit is established. The College contends the "maximum"

tuition credit benefit is established by an objective standard the two-year degree program requiring the greatest number of credit hours (114 credits). The Federation contends the "maximum" is a subjective standard in which any necessary or recommended prerequisites must be included.

I find both positions have merit. I find one reasonable interpretation is to establish the lifetime tuition-waiver benefit equal to the greatest number of credit hours necessary to obtain a two-year degree. Similarly, I find another reasonable interpretation is a subjective standard which includes necessary prerequisites, especially for a community college where a substantial majority of students must take prerequisites in order to enroll in courses required for their selected major. These findings lead me to conclude the phrase "a maximum of the credits required to obtain a two year degree in a College program" is ambiguous.

Having found an ambiguity, I must now look to the parties' bargaining history and past practice to determine the parties′ intent. Both parties contend their positions are supported by the parties′ past practice and their bargaining proposals. The language of Article 15.12 was first agreed to in negotiating the 1989 -1992 CBA. During those negotiations, both parties seemed to have the same objective to contractually commit to the then "current level" of tuition-waiver benefit. *See* Exhibit F-9 and Exhibit C-4. Accordingly, I find a historical review of the "tuition-waiver" provisions and policies is be helpful to my determination.

In the 1986 - 1989 CBA, the parties agreed to a maximum tuition-waiver benefit of six credit-hours per term, per dependent. The parties did not provide for any lifetime maximum number of credit-hours. The agreement between the College and the Federation of Classified Employees also contained a tuition-waiver benefit which allowed 19 credit-hours per term, but limited the benefit to six (6) terms. *See* Exhibit C-1. In 1987 the College and the Classified Employees reached a new agreement which provided:

> 18.11 Tuition shall be waived for a full-time employee, spouse or eligible children who attend classes at Portland Community College as follows:
>
> (2) Spouse and dependent children - up to 19 credit hours per term each or a maximum of the credits required to obtain a two year degree in a college program.

Bev Hooten, PCC′s former director of labor relations, testified that shortly after ratification of the 1987 - 1990 Classified Employee agreement, the College began administering the tuition-

waiver benefit in the same manner to all College employees. Thus, Federation members began receiving tuition-waivers of up to 19 credit-hours per semester, even though the parties' agreement at the time limited the tuition waiver benefit to six credit-hours per term.

According to the College, the new tuition-waiver benefit language in the 1987 - 1990 Classified Employee agreement allowed employees' dependents the flexibility of taking tuition-waived credits over a longer time (instead of the previous six-term limit). Following this change, the classified employee's tuition-waiver authorization form was modified to state: "Spouse/dependent child entitlement: 19 credit hours per term each or the total credits required to complete a two year degree." *See* Exhibit C-5.

In the negotiations for the 1989 - 1992 Federation / College CBA, the Federation initially proposed a tuition-waiver for dependents of "up to 19 credit hours per term each" with no lifetime limit. *See* Exhibit J-8. The College's November 18, 1988 proposal did not change the contractual commitment from the 1986 - 1989 agreement (i.e., a maximum of six credits per term, no lifetime limit); however, the College verbally agreed to maintain the tuition-waiver benefits granted by the College board (19 credit hours per term "with the increased time flexibility," i.e., not limited to six terms). *See* Exhibit C-2 at 2. At the next negotiating session of April 15, 1989, the Federation resubmitted its proposed 19 credit hours per term, but without any lifetime limit; the College maintained its earlier position. *See* Exhibit C-2 at 7. According to the testimony of the College's chief negotiator, Beverly Hooten, the Federation wanted the "current practice" in the agreement, and the College wanted the flexibility of maintaining the tuition-waiver benefits outside of the contract. According to Hooten, at that time the Federation was under the mistaken belief the "current practice" did not have a lifetime maximum. But the pre-1997 tuition waiver form had a limit of "six terms," and the Classified agreement had a maximum limit of "a maximum of the credits required to obtain a two year degree in a college program." Both Hooten and the Federation's chief negotiator, Steve Carey, testified that the Federation needed to have the "current practice" regarding tuition-waiver included in the contract or there would not be an agreement. At

the next negotiating session of April 22, 1989, the College proposed the present language which mirrored the language in the Classified Agreement.[3]

Hooten testified she informed the Federation's negotiators that the intent of the phrase "a maximum of the credits required to obtain a two-year degree in a college program" was to set a limit on the total number of tuition-free credits to which employees' family members would be entitled, but to give employees' family members the flexibility to take those credits over a longer time. The parties did not specifically discuss waiver of tuition for preparatory or nondegree classes.

[3]The actual language between the 1989 - 1992 CBA and the current CBA is different. However, there is no difference in the operative language. The current language merely added the phrase "domestic partner" to those entitled to the tuition-waiver benefit.

PCC Director of Human Resources Jerry Donnelly testified that prior to 1998 the College did not have a good method for monitoring the number of tuition waivers received by an employee's family member. According to Donnelly, the College relied primarily on a recipient's integrity to ensure the benefit was not abused. However, in 1998 the College developed a method of tracking tuition waivers on its computer system using the dollar equivalent of the maximum tuition waiver benefit.[4] Since implementing this system, the College has notified employees or the employee's family members when they are reaching their maximum benefit amount. Since 1998 (and before Jorge Bugarin received his notice) the College notified ten employee family members (including two covered by the Federation Agreement) that they had reached their maximum benefit level. *See* Exhibit C-8.

After reviewing all of the parties' evidence regarding pre-contract negotiations and past practice, I find the lifetime maximum tuition-waiver contained in CBA Article 15.12 must consider an individual's need for prerequisites in order to obtain a two-year degree. I base my finding on the following.

First, I have to ask the rhetorical question: Why didn't the College propose a maximum tuition-waiver benefit of 114 credits? It is incumbent upon the proponent of a contract provision

[4]This method uses 114 credit hours times the current tuition rate per credit hour to establish a dollar amount that is roughly equivalent (actually it is a slightly greater benefit when tuition increases) to a 114 credit maximum. This dollar equivalent can then be allocated to a particular employee's family member, thereby allowing the College to monitor the amount of tuition-waiver benefits used by a person.

either to explain what is contemplated or to use language that does not leave the matter in doubt. *See* Elkouri at 510. If the College wanted an objective standard, it was certainly easy to propose an objective standard. After all, both parties were ostensibly trying to agree on the "current practice." Instead, the College proposed a vague and ambiguous phrase which I have already found could be interpreted to include the necessary prerequisites many community college students take in order to enroll in the required courses for their degree. Accordingly, I find the College's proposal did not clearly express the meaning it intended, and the Federation was reasonably misled as to the College's intention in establishing the tuition-waiver lifetime maximum.

Additionally, in explaining its proposal, the College did not say to the Federation: "We want to use this vague language, but what we really mean is a lifetime maximum tuition-waiver benefit of 114 credits." Instead, the College's chief negotiator told the Federation's negotiators that the intent of the phrase was to set a limit on the total number of tuition-free credits to which employees' family members would be entitled, but to give employees' family members the flexibility to take those credits over a longer time. I find the College proposed vague and ambiguous language, and then the College failed to explain that this vague language was meant to establish an objective standard of 114 hours.

Furthermore, even though the College was interpreting this ambiguous language to mean 114 credits, the College perpetuated the ambiguous language by including it on the Employee Tuition Waiver Authorization. As a practical matter, the first time anyone learns of the College's interpretation is when the College informs someone that his or her tuition-waiver benefit is nearly exhausted.

Accordingly, given the simplicity with which the College could have stated its intent, I conclude it is reasonable to assume "a maximum of the credits required to obtain a two-year degree in a college program" means more than simply "a maximum of 114 credits."

Second, I find the parties' past practice is not helpful in clarifying Article 15.12's ambiguous language. In order for a past practice to add meaning to an ambiguous contract provision, the practice must be of sufficient generality and duration to imply acceptance of it as an authentic construction of the contract. *See* Elkouri at 650. In the instant case, the College did not begin tracking the College's imposed tuition-waiver maximum until 1998. Thus, there was no "practice" for the first ten years of the agreement. Furthermore, the parties admit the number of employees'

dependents reaching the College's imposed tuition-waiver maximum was small (eight). The number of Federation employee dependents was even smaller (two), and neither one was brought to the attention of the Federation. I find the parties' past practice on Article 15.12 is too insignificant and inadequate to provide a guide for interpretation.

Third, I have considered the College's argument that a review of tuition-waiver issues on a case-by-case basis would be unreasonably and unjustly burdensome. I find the College has not made a sufficient showing that such an interpretation would be unreasonably unjust or burdensome because the College acknowledges the infrequency of this occurrence. Furthermore, CBA Article 15.12 clearly establishes a maximum, albeit a subjective one. I find nothing in the agreement which prohibits the College from requiring a Federation employee's dependent who exceeds 114 tuition-waived credits (or the College's formula) to show the credits taken were "required," i.e., necessary prerequisites to obtain his or her two-year degree. Admittedly, this involves more administration than simply setting the maximum at 114 credits, but I find it is not an unreasonable burden given the infrequency of this occurrence, and the College's failure to clearly state, in the agreement or otherwise, what it apparently meant.

Fourth, I find the instant case is not one where the Federation is attempting to obtain through arbitration what it clearly did not obtain in bargaining. The Federation's 1989 bargaining proposals did not set any limit on the tuition-waiver benefit. The Federation did not argue the benefit is unlimited. Instead, the Federation argued Bugarin had not yet reached his limit because his course-work was required to obtain his two-year degree.

In the instant case, the is no question Bugarin's courses were part of an overall plan to achieve a two-year degree. With the possible exception of nine credits (which were recommended but not required), Bugarin has taken only required and prerequisite courses, and he has not changed his major, nor has he dropped courses for which the tuition-waiver benefit was expended. In short, I find Bugarin has not exhausted his tuition-waiver benefit because he has not surpassed the maximum of the credits he was required to take in order to obtain his two-year degree in civil engineering.

AWARD

1. For the reasons stated herein, the grievance is GRANTED.

2. The College shall grant Jorge Bugarin past and continuing tuition-waiver benefits consistent with this Opinion and Award.

3. In accordance with CBA Article 25.47 the College and the Federation shall pay my costs and fees related to this arbitration on an equal basis.

Respectfully submitted this 14th day of October 2002.

_____
William F. Reeves
Arbitrator

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Certificate of Service: The undersigned hereby certifies that on the 14th day of October , 2002, a true and correct copy of this Opinion and Award was mailed to the following: Craig Armstrong and John Sutter
by_____